No. 88-1466

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PEOPLE OF ENEWETAK, RONGELAP, and
OTHER MARSHALL ISLANDS ATOLLS,
Petitioners,

v.

THE UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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REPLY BRIEF

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1. The Petition for Certiorari set forth two issues of major importance on which the decision below is inconsistent with controlling decisions of this Court and other federal circuits:

> First, whether Congress could, consistent with the Constitution, eliminate the jurisdiction of all federal courts and withdraw consent to be sued with respect to petitioners' claims for the taking of their property without just compensation.
>
> Second, whether the court below acted properly in deciding that grave constitutional question when it could have avoided the issue by adopting an alternative construction of the jurisdictional statute that

> was consistent with if not mandated by the language of the statute, the legislative scheme and the relevant legislative history.

The government's brief in opposition consists of 27 pages of argument on the merits of these issues, without seriously contesting their importance and suitability for decision by this Court. On the contrary, the vigor, elaboration and complexity of the government's argument itself suggests that the Petition should be granted so that the issues can be resolved here.

2. The brief in opposition like the opinion below is predicated on the proposition that Congress has absolute and untrammelled power to withdraw the consent of the United States to be sued on any claim, "even where the underlying claim may be one of constitutional dimension . . . ." Brief in Opposition (Br. Opp.) at 18-19. The brief in opposition cites *Lynch v. United States*, 292 U.S. 571 (1934), for this proposition, without noting that the language relied on is dictum: Justice Brandeis, following the very rule that the lower court ignored in this case, avoided the constitutional question by construing the statute before him as not withdrawing jurisdiction. The government's position (as well as that of the court below) is flatly in conflict with the alternative holding of the Court of Appeals for the District of Columbia Circuit in *Bartlett v. Bowen*, that the withdrawal of jurisdiction and consent to be sued in all federal courts with respect to a constitutional claim is a denial of due process of law. 816 F.2d 695 (D.C. Cir.), *reh'g denied*, 824 F.2d 1240 (D.C. Cir. 1987). The brief in opposition does not even cite *Bartlett*, much less show why this conflict of circuits is not, of itself, a ground for granting the Petition. If the sweeping dictum of Justice Brandeis in *Lynch* is the law despite the intervening half-century of the jurisprudence on judicial protection of constitutional rights, this Court should make that clear.

3. The brief in opposition relies heavily on Chief Judge Wald's separate opinion in *Cathelina Antolok v. United States of America*, No. 87-5324 (D.C. Cir. Apr. 28, 1989), in support of its argument on the issue of espousal, which was not considered below and is not presented by the Petition for Certiorari. Br. Opp. at 26-27. It fails to mention the dissenting portion of that opinion, in which she endorsed the statutory construction advanced by petitioners, an issue that *is* presented in this Petition. Chief Judge Wald's dissent expressly points out the error of the *Antolok* majority in flouting the repeated admonition of this Court to avoid the construction of a statute to withdraw jurisdiction over constitutional claims where another construction is available. *Antolok v. United States of America*, No. 87-5324, slip op. at 1-12 (D.C. Cir. Apr. 28, 1989) (Wald, C.J., concurring in judgment only); *see, e.g., Webster v. Doe*, 108 S. Ct. 2047 (1988). The very fact that Chief Judge Wald embraced the alternative construction demonstrates that the Federal Circuit in this case ignored the controlling precedents of this Court.

4. At the very least, the brief in opposition's extensive reliance on *Antolok*, *see, e.g.*, Br. Opp. at 2, 3, 6, 10, 13, 14, 16-19, 26, 27, suggests that the Court should grant the attached motion of petitioners to defer consideration of this case until a petition for certiorari is filed in *Antolok*. It is apparent from the brief in opposition that the two cases are closely intertwined. The Court should not deny this Petition without having the benefit of a full exposition of the *Antolok* decision in relation to the importance of the issues presented here.

5. As Congressman Seiberling's *amicus* brief in support of the Petition states, the issues presented by the Petition are not only of legal importance sufficient to warrant the grant of certiorari, but of "great moral . . . significance

for the United States" as well. Amicus Brief at 2.[1] The cases before the Court represent the last recourse for the Marshall Islanders to test the constitutionality of the arrangements by which the United States sought to dispose of their constitutional claims against it. In the light of this country's responsibilities for three decades as trustee of these peoples, the action of the court below in closing the door on constitutional adjudication demands review by this Court. Nothing in the brief in opposition gainsays that fact.

* * * *

The Petition for Certiorari should be granted, or, in the alternative, the Court should grant petitioners' motion to defer action until the Petition can be considered together with a petition for review of *Cathelina Antolok v. United States of America*.

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[1] The brief in opposition deprecates the significance of Congressman Seiberling's comments on the meaning of the Compact Act on the ground that they were inserted in the record after the floor debate on that statute, although this is true of only one portion of his remarks. The brief does not disclose that Senator McClure's remarks on which *it* relies were also inserted in the record after floor debate. Senator Johnston's remarks, made four years after passage, appear on their face to have been manufactured for the purposes of this litigation.

Respectfully submitted,

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